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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JOE ISAIS,

Defendant and Appellant.

H045932

(Santa Clara County
Super. Ct. No. C1636412)

Defendant Joe Isais pleaded no contest to possessing a firearm as a felon, giving a false name to a police officer, and possessing 28.5 grams or less of marijuana. The trial court placed defendant on three years' formal probation as called for by the plea agreement and imposed various conditions. Defendant twice violated his probation. After the second violation, the court revoked defendant's probation and imposed a two-year prison sentence. On appeal, defendant's counsel filed an opening brief in which no issues are raised and asked this court to independently review the record under *People v. Wende* (1979) 25 Cal.3d 436. We sent a letter to defendant notifying him of his right to submit a written argument on his own behalf on appeal. He has not done so.

We requested supplemental briefing from the parties as to whether, under *People v. Dueñas* (2019) 30 Cal.App.5th 1157, the trial court erred in imposing any fines or fees without ascertaining defendant's ability to pay. Defendant now requests remand for a hearing, under *Dueñas*, regarding his ability to pay the court operations assessment, the court facilities assessment, and the restitution fine. Because those fines and fees were

imposed when the trial court initially granted probation, and because defendant failed to timely appeal from that order, they are final and cannot be challenged on this appeal. Therefore, we affirm.

I. BACKGROUND

A. *Factual Summary*¹

Just after midnight on April 7, 2016, San Jose Police officers contacted defendant, who was riding his bike on the sidewalk. Defendant gave the officers a false name and admitted to possessing marijuana and recently smoking methamphetamine. Officers arrested defendant for being under the influence of a controlled substance. Incident to that arrest, they searched defendant's person. In his pockets, they located .22-caliber rounds of ammunition, approximately 1/8 ounce of marijuana, and identification that did not match the name defendant had provided. A records check of the name on the identification—defendant's true name—indicated that defendant was on probation with a search condition. Officers then searched defendant's backpack, where they found an improvised firearm.

B. *Procedural History*

The Santa Clara County District Attorney filed a first amended complaint on July 6, 2016, charging defendant with possessing a firearm as a felon (Pen. Code, § 29800, subd. (a)(1))², a felony; giving a false name to a police officer (§ 148.9), a misdemeanor; and possessing 28.5 grams or less of marijuana (Health & Saf. Code, § 11357, subd. (b)), an infraction. The first amended complaint also alleged that defendant had one prior strike conviction (§§ 667, subd. (b)-(i)/1170.12).

On August 19, 2016, pursuant to the prosecutor's request, the strike prior allegation was stricken because defendant's prior conviction did not qualify as a strike.

¹ The facts are taken from the January 2017 petition for modification of defendant's probation.

² All further statutory references are to the Penal Code unless otherwise indicated.

Defendant then pleaded no contest to all charges on the condition that he would receive three years' formal probation and serve six months in county jail with credit for time served. The plea form—signed by defendant, his counsel, the prosecutor, and the court—includes a section entitled “fines and fees.” In that section of the plea form, defendant initialed next to three items, thereby indicating that he understood and agreed with each. The first item states “I understand: I will be ordered to pay fines, fees, and costs, which may include: . . . a mandatory restitution fine of not less than \$300 and not more than \$10,000 (plus a 10 percent county assessment); a probation or parole revocation fine equal to the imposed restitution fine; a court operation assessment of \$40 per count; [and] a criminal conviction assessment of \$30 per count Depending upon my ability to pay, I may also be required to pay a crime prevention fund fine of \$10 (plus over 310% in penalty assessment); a \$4 emergency medical air transportation penalty for each vehicle code violation; an AIDS education fund fine of \$70 (plus over 310% in penalty assessment); a drug program fee not to exceed \$150 for each separate drug offense (plus over 310% in penalty assessment); a criminal justice administration fee of up to \$259.50; a probation supervision fee (up to \$110 a month); and court appointed attorney’s fees; and I do not contest my ability to pay these fines and fees.” The second item states: “I understand if I am sentenced to state prison, the Court will impose a parole revocation fine, which I have to pay if my parole is later revoked. I also understand if I am granted probation, the Court will impose a probation revocation fine, which I have to pay if my probation is later revoked.” The third item states: “I understand the amount of the restitution fine . . . to be imposed in my case is not part of any plea agreement and the sentencing judge may impose any amount within the minimum and maximum range.” At the time defendant entered his plea, he assured the court that the signature and initials on the form were his, that he had had sufficient time to review the form with his attorney, and that he did not have any questions about the form.

The trial court suspended imposition of sentence and placed defendant on formal probation for three years on September 9, 2016. The conditions of defendant's probation included that defendant enter and complete a substance abuse treatment program, seek and maintain gainful employment or training, and serve 180 days in county jail. The court awarded defendant a total of 181 days of presentence credits, consisting of 91 days of actual custody and 90 days of conduct credits, and it deemed his jail sentence served.

The court imposed the following fines and fees: a \$300 restitution fine (§ 1202.4, subd. (b)(1)) plus a 10 percent (\$30) administrative fee; a \$300 probation revocation fine, which was suspended pending successful completion of probation (§ 1202.44); a \$120 court operations assessment (also referred to as a court security fee) (§ 1465.8, subd. (a)(1)); a \$95 criminal conviction assessment (also referred to as a court facilities assessment) (Gov. Code, § 70373); and a monthly probation supervision fee not to exceed \$25 (§ 1203.1b). Defendant did not object. The court struck the booking fee (also known as the criminal justice administration fee).

In January 2017, the probation department filed a petition for modification of probation, reporting that defendant had failed to keep probation advised of his whereabouts, report for scheduled appointments with probation, provide proof of participation in a substance abuse program, and provide proof of employment or schooling. The court revoked defendant's probation and issued a bench warrant for his arrest on February 2, 2017. Defendant was arrested on the bench warrant on April 6, 2017. On April 13, 2017, defendant admitted violating his probation. The court found a violation, reinstated probation, and sentenced defendant to six months in county jail, with 16 days of presentence credits, consisting of eight days of actual custody and eight days of conduct credits.

In August 2017, the probation department filed another petition for modification of probation, reporting that defendant had failed to report to probation as directed, provide proof of participation in a substance abuse program, and provide proof of

employment or schooling. The court revoked defendant's probation for a second time and again issued a bench warrant for his arrest on August 30, 2017. Defendant was arrested on the bench warrant on April 20, 2018.

Following a May 21, 2018 hearing at which defendant's probation officer testified, the court found that defendant had violated his probation. The court then sentenced defendant to the middle term of two years on the count 1 felony with no additional penalty for the count 2 misdemeanor or the count 3 infraction. The court imposed the previously suspended \$300 probation revocation restitution fine (§ 1202.44) and imposed but suspended a \$300 parole or postrelease community supervision revocation fine (§ 1202.45). The court awarded defendant a total of 432 days of presentence credits, consisting of 216 days of actual custody and 216 days of conduct credits.

There is no evidence in the record regarding defendant's personal financial status, education level, or employment history. He was represented by the Public Defender Office below.

Defendant timely appealed.

II. DISCUSSION

We requested supplemental briefing from the parties as to whether, under *Dueñas*, the trial court erred in imposing any fines or fees without ascertaining defendant's ability to pay. We specifically requested that the parties address: (1) this court's jurisdiction over the fines and fees imposed at the time the superior court initially granted probation, given both defendant's failure to appeal from the order granting probation and the superior court's order, at the time probation was revoked, that the abstract of judgment should reflect all of the fines, fees, and assessments imposed with the original grant of supervision; (2) whether defendant waived any challenge to the fines and fees in the plea form and/or forfeited any such challenge by failing to object below; and (3) the

appropriate remedy on appeal, assuming cognizable error.

Defendant now seeks remand for a determination as to his ability to pay the court operations assessment, the court facilities assessment, and the restitution fine under *Dueñas*. The trial court imposed those fines and fees at the time it initially granted probation. Defendant did not appeal from the order granting probation, despite the fact that it was an appealable order. (§ 1237, subd. (a).) The Attorney General argues that this court therefore lacks jurisdiction over the assessments and the restitution fine. Defendant disagrees. He maintains that because the trial court suspended *imposition* of sentence (rather than imposing sentence and suspending its *execution*) when it placed him on probation, “the trial court continued to have jurisdiction to modify any part of the order.” The Attorney General has the better argument.

“In general, an appealable order that is not appealed becomes final and binding and may not subsequently be attacked on an appeal from a later appealable order or judgment. [Citations.] Thus, a defendant who elects not to appeal an order granting or modifying probation cannot raise claims of error with respect to the grant or modification of probation in a later appeal from a judgment following revocation of probation.” (*People v. Ramirez* (2008) 159 Cal.App.4th 1412, 1421 (*Ramirez*).)

Defendant says the foregoing rule does not apply here because the trial court, having not imposed sentence, had jurisdiction to modify any part of its prior order. We are not convinced. We acknowledge that where a court “impose[d] sentence but suspended its execution pending a term of probation,” it must impose that exact sentence on revocation of probation. (*People v. Howard* (1997) 16 Cal.4th 1081, 1088 (*Howard*).) Accordingly, when a court imposes sentence but suspends its execution at the time probation is granted, a defendant must challenge the sentence in an appeal from the order granting probation. (*Ramirez, supra*, 159 Cal.App.4th at p. 1421.) By contrast, “[w]here a trial court suspends *imposition* of sentence before placing a defendant on probation, it has ‘full sentencing discretion [up]on revoking probation.’” (*Howard, supra*, at p. 1087,

fn. omitted.) Naturally, a defendant need not challenge his yet-to-be-imposed sentence on appeal from the order granting probation in those circumstances.

But where imposition of sentence is suspended, the sentencing court does not retain the same flexibility as to fines and fees as it does regarding the sentence of imprisonment. “The triggering event for imposition of the restitution fine is . . . conviction. (Pen. Code, § 1202.4, subd. (b).)” (*People v. Chambers* (1998) 65 Cal.App.4th 819, 822.) “[T]here is no provision for imposing a restitution fine after revocation of probation.” (*Ibid.*) Nor does the Penal Code allow for the modification of the restitution fine upon revocation of probation. Accordingly, the trial court was without authority to modify the restitution fine when it eventually revoked probation and imposed sentence. The same reasoning applies to the court operations and court facilities assessments, which—like the restitution fine—are triggered by conviction. (§ 1465.8, subd. (a)(1) [“an assessment of forty dollars (\$40) shall be imposed on every conviction for a criminal offense . . .”]; Gov. Code, § 70373 [“an assessment shall be imposed on every conviction for a criminal offense . . .”].) For the foregoing reasons, defendant was required to challenge the court operations assessment, the court facilities assessment, and the restitution fine on appeal from the order of probation imposing them. Because he failed to do so, those impositions became final and cannot now be challenged.

III. DISPOSITION

The judgment is affirmed.

ELIA, ACTING P. J.

WE CONCUR:

BAMATTRE-MANOUKIAN, J.

MIHARA, J.